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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ

Petitioners

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Respondents

BRIEF FOR RESPONDENT, TEAMSTERS LOCAL UNION NO. 676

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BRIEF FOR RESPONDENT, TEAMSTERS LOCAL UNION NO. 676

JURISDICTION

Jurisdiction was invoked by the Petitioner under 28 U. S. C. §1254(1). The final judgment of the United States Court of Appeals for the Third Circuit was entered on November 22, 1972. Petitioner's timely request for rehearing was denied by the Court of Appeals on December 20, 1972. Petitioner petitioned the United States Supreme Court for a writ of certiorari on May 19, 1973, and the Court granted the petition on October 9, 1973.

QUESTION PRESENTED

Whether the petitioner's claim that state welfare assistance to strikers violates the Constitution and laws of the United States is rendered moot by the end of the strike at petitioner's plant and the concomitant cessation of welfare payments to the strikers, prior to the district court's hearing of petitioner's original complaint?

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Clause 1 (App., p. 109)

STATEMENT OF THE CASE

On May 14, 1971, the employees of the petitioner, hereinafter referred to as "Super Tire," who are represented by the Respondent, Teamsters Local Union No. 676, hereinafter referred to as "Local 676," began an economic strike in support of their demands for a new collective bargaining agreement to replace the contract that had expired on May 14, 1971. Four weeks later, on June 10, 1971, Super Tire brought suit against certain officials of the State of New Jersey and of Camden County[1/] in United States District Court for the District Court of New Jersey, alleging that numerous striking Super Tire employees were receiving welfare benefits from the State. (App., pp. 12-24). Super Tire complained that the State's action amounted to a subsidy of the striking employees, which thwarted the national policy fostering free collective bargaining expressed in the National Labor Relations Act, [2/] and contravened the Supremacy Clause of the Constitution. Super Tire sought injunctive relief against further welfare payments to its striking employees and a declaratory judgment stating that the New Jersey regulation permitting the payment of the welfare benefits to the striking Super Tire employees was a violation of national labor policy and the Supremacy Clause of the United States Constitution.

The economic strike by Super Tire's employees continued through June 23, 1971, when the employees ratified a new contract proposal negotiated by Super Tire and Local 676. (App., p. 39). The employees were scheduled to return to work during the remaining part of the

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1/ Local 676 was permitted to intervene as a party defendant by the district court.

2/ National Labor Relations Act, as amended, 29 U. S. C. §151 *et seq.*; §§151, 158 (App., pp. 109-112).

week, and completely normal operations were resumed by Monday, June 28, 1971. The alleged payment of welfare benefits to those striking employees who had claimed the benefits ceased with the ratification of the new contract.

On Thursday, June 24, 1971, Super Tire's complaint and request for injunctive relief were heard by the district court, Judge John J. Kitchen presiding. After hearing the arguments of counsel, the district court concluded that Super Tire had failed to state a claim upon which relief may be granted, and granted Local 676's motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court viewed the decision in *I. T. T. Lamp Division v. Minter*, 435 F. 2d 989 (1st Cir., 1970), *cert. denied* 402 U. S. 933 (1971), *reh. denied* 404 U. S. 874 (1971) as "... controlling because I feel that any action in this matter such as those enumerated in the case and in which they said, they are going to be recovering, I feel, that such rulings or such testimony should be heard by Congress for whatever action they deem appropriate." (App., p. 45). As a result of this decision, the district court did not hear testimony or review other evidence. The court did not reach the question of constitutionality of welfare eligibility for striking employees, or the issue of mootness raised by Local 676.

Super Tire appealed the district court's decision to the United States Court of Appeals for the Third Circuit, which heard argument by counsel on September 14, 1972. In an opinion filed November 22, 1973, the Court of Appeals, Gibbons C.J., dissenting, dismissed the appeal as moot, and remanded the case to the district court with instructions to vacate its order and dismiss the complaint as moot. (App., pp. 48-72, 73-4). Based on the fact that "...the labor dispute [between Super Tire and its employees] undergirding this challenge to the New Jersey programs had been concluded before the trial

judge dismissed the action and long before appeals were filed or argued in this Court," (App., pp. 49-50), the court concluded that the Supreme Court's decision in *Local No. 8-6, Oil, Chemical and Atomic Workers, Int'l Union, AFL-CIO v. Missouri*, 361 U. S. 363 (1960) "...requires that we dismiss this appeal." (App., p. 65). The Court noted that the task of the federal judiciary "...does not involve conjuring up situations to preserve an otherwise quiescent issue, nor does our assignment include constitutional adjudication unless such is necessarily implicated in the decision of a case or controversy squarely before the Court." (App., p. 65). The court found that Super Tire's reliance on the doctrine of *Southern Pacific Terminal Co. v. I. C. C.*, 219 U. S. 498 (1911) and on the claim that the mere availability of welfare payments to potential striking employees had a continuing direct effect on the collective bargaining relationship, did not save the appeal from "[t]he lack of immediacy and solidity of interest necessary to support jurisdiction..." (App., p. 65). Judge Gibbons argued in dissent that the public interest in the case, and the likelihood that the issues presented would recur, required a decision on the merits. Super Tire's request for a rehearing was denied by the Court on December 20, 1972. (App., p. 108).

SUMMARY OF ARGUMENT

The application of the mootness doctrine by the federal courts is based upon a set of flexible standards. In cases such as the one before the Court where the challenged activity is that of the government and where the activity has ceased prior to any court hearing, and thus terminated any present effect upon the complaining litigant, the federal courts examine the probability that the challenged activity will recur, and the probability that such a recurrence will affect the same complaining litigant's

interests to determine whether the case has become moot.

It is undisputed that the underlying labor dispute, and the alleged concomitant payment of welfare benefits ceased prior to the district court's dismissal of Super Tire's complaint. Under *Oil Workers v. Missouri*, the instant case is moot, unless Super Tire can demonstrate that the challenged activity will probably recur and that its interests will probably be affected by such recurrence. The instant facts do not indicate that (1) a strike will probably occur in the future; (2) potential Super Tire strikers will probably be eligible for, and receive payments of, welfare benefits; and (3) assuming that welfare benefits are available, that the mere availability has any substantial present or future effect upon Super Tire's interests. There is not case or controversy present before this Court, and therefore the Court of Appeals properly dismissed this litigation for mootness.

ARGUMENT

I. THE CURRENT CONTOURS OF THE MOOTNESS DOCTRINE.

The federal courts have traditionally refused to entertain cases which lacked "... subject matter on which the judgment of the court can operate," *Ex Parte Baez*, 177 U. S. 378, 390 (1900), or requested the court to issue an advisory opinion. *Muskrat v. United States*, 219 U. S. 346, 351-353 (1911). The mootness doctrine, as expressed in these decisions, was applied to cases in which the judgment sought from the court could not be carried into effect, and cases in which the relief sought was impossible to grant. Since the advent of the declaratory judgment as a recognized remedy, the mootness doctrine has assumed the role of a jurisdictional barrier under Article III of the Constitution. See *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 241 (1937). As the Supreme Court explained in *North Carolina v. Rice*, 404 U. S. 244, 246 (1971),

> [m]ootness is a jurisdictional question because the Court "is not empowered to decide moot questions or abstract prepositions". *United States v. Alaska S. S. Co.*, 253 U. S. 113, 116 (1920), quoting *California v. San Pablo & Tulare R. Co.*, 149 U. S. 308, 314 (1893); our impotence "to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco, Inc.*, 375 U. S. 301, 306 n. 3 (1964). See also *Powell v. McCormack*, 395 U. S. 486, 497 n. 7 (1969).

The intent of this Article III jurisdictional barrier seems basically similar to the goal of "judicial economy" attributed to the historical use of the mootness doctrine by the federal courts. The objective is to insure that

only a law suit which is ". . . definite and concrete, touching the legal relations of the parties having adverse legal interests . . . [and] a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts", can be considered and decided by a federal court. *Aetna Life Ins. Co. v. Haworth, supra.*

The mootness jurisdictional barrier has been invoked by the federal courts in a variety of factual situations. 3/ In circumstances such as those presently before the Court, where the challenged activity or inactivity is that of the government, and where the immediate dispute has ended because the activity in question has ceased, and thus ended any present effect on the objecting party, the application of the mootness doctrine is not based upon the "mere possibility" standard declared in *United States v. W.T. Grant Co.*, 345 U. S. 629, 633 (1953). See *Commercial Cable Co. v. Burleson*, 250 U. S. 360 (1919); *Local No. 8-6, Oil, Chemical and Atomic Workers, Int'l Union, AFL-CIO v. Missouri*, 361 U. S. 363, 368-369 (1960). 4/ Rather, the federal courts examine the facts of each case to determine whether it is probable that the challenged governmental activity will recur, and also probable that the recurrence will affect the same challenging parties. If there is only a mere possibility of recurrence of the activity, then the impact upon the objecting litigant must be certain and substantial. See *Gray v. Sanders*, 372 U. S. 368 (1963). These two probabilities are applied by the

3/ See generally the majority opinion below, App. pp. 50-60, 469 F. 2d 911, 914-919; Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. at 1678-1685.

4/ The Oil Workers v. Missouri case will hereinafter be referred to as *"Oil Workers"*.

courts to insure that a private litigant has a sufficient personal stake in the suit when he challenges governmental actions.[5/]

An alternate standard for finding a sufficient personal stake in a private litigant challenging governmental action was employed by the Supreme Court in *Southern Pacific Terminal Co. v. I. C. C.* 219 U. S. 498 (1911). The often quoted phrase "capable of repetition, yet ending review", refers to the Court's conclusion that the legality of the I. C. C.'s order was the proper subject for the court, despite the fact that the order had expired before the case reached the Court.[6/] While the *Southern Pacific* "standard" has never been used in lieu of the two-probability standard of *Gray v. Sanders, supra.*,[7/] the requirement for certainty of effect upon recurrence of the activity has very occasionally been relaxed. For example, in *Sibron v. New York*, 392 U. S. 40 (1968), the court cited *Southern Pacific* in holding that the fact that the Petitioner had served his six-month sentence prior to the arrival of his appeal before the court did not moot his case. The court reasoned that a dismissal of the case would permit the State to prevent review of many cases by imposing short sentences and denying bail pending appeal. The court noted the injustice inherent in such a result: "a State may not effectively deny a convict access to its appellate courts until he has been released and then argue that his case has been mooted by his failure to do what [the State] alone prevented him from doing". 392 U. S. at 53. The

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5/ See generally, Note *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. at 1683-85.

6/ 219 U. S. at 515.

7/ See *Carroll v. President & Comm'rs*, 393 U. S. 175 (1968); *Ford Motor Co. v. United States*, 335 U. S. 303 (1948).

court concluded that the importance of maintaining avenues of judicial review for alleged deprivations of constitutional rights free from government created obstructions outweighs any considerations of mootness.

As Circuit Judge Adams noted in the opinion below, " . . . broad statements about mootness suffer the same infirmity as general discussions about most abstruse subjects" (App., p. 51). Whether by choice or by necessity, the Court has avoided a broad mootness "test", and has, instead, developed flexible standards for deciding whether a particular private challenge to governmental action has been mooted by the cessation of the challenged activity. The *Gray v. Sanders, supra*, approach which examines the probabilities of the recurrence of the activity and the impact on the objecting litigant, is used by the court in most recurrence cases. The *Southern Pacific* "capable of repetition, yet evading review" approach is occasionally employed in conjunction with the "two-probability" standard of *Gray* in a special class of recurrence cases in which the complained of governmental activity directly attacks the complaining litigant, the activity has a short duration, and the court fears that a dismissal for mootness might encourage the government to dodge judicial review of the questionable activities by engaging in brief and repeated conduct against the complaining litigant.

II. THE COURT OF APPEAL'S DISMISSAL OF THE INSTANT CASE AS MOOT WAS PROPER.

A. Under Oil Workers v. Missouri, the instant case is moot because the underlying labor dispute and alleged concomitant payment of welfare benefits to the striking employees terminated prior to the district court's dismissal of the complaint.

At the time that Super Tire filed its original complaint, it did not complain primarily of the *existence* of the welfare programs, as it does now before this Court. Paragraphs 6, 7 and 15 of Counts I and II of Super Tire's complaint to the district court clearly refer to the alleged *payment* of welfare benefits by the Respondent State and County officials to the striking Super Tire employees. The thrust of the complaint was at the payment of the benefits to these specific striking employees, and the relief requested was an order haulting those payments.

The alleged payments of welfare benefits to the striking employees ceased before the district court heard argument and made its decision. A new contract had been ratified by the Super Tire employees on June 23, 1971, and the strike had been terminated by the morning of the district court hearing. As Judge Adams noted in the opinion below, " . . . it is clear that the labor dispute undergirding this challenge to the New Jersey programs had been concluded before the trial judge dismissed the action and long before the appeals were filed or argued in this Court." (App., p. 49-50). With the satisfactory resolution of the labor dispute, the alleged payment of the welfare benefits to the strikers ended.[8/] Thus, regardless of the alleged objectionable nature of the payments, all present adverse effect of these

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8/ This representation was made to the district court by counsel for Local 676 and was not contested by Super Tire (App. pp. 39, 42).

payments upon Super Tire ceased prior to district court's decision because the underlying labor dispute had been settled.

Under *Oil Workers v. Missouri, supra.*, and *Division 1287 Bus Employees v. Missouri*, 374 U. S. 74 (1963)[9], the end of the underlying labor dispute renders the instant case moot. In *Oil Workers*, the complaining union challenged the constitutionality of a Missouri statute[10] empowering the Governor of the state to seize and operate a privately owned public utility that had been struck by its employees, and making strikes against such facilities after the take-over unlawful. The union struck a privately owned natural gas company, the Governor then seized the company, and obtained a injunction against any further work stoppages, according to the statutory scheme. The day after the injunction was issued, the strike ended. Within three months, the underlying labor dispute was settled, and the seizure terminated. The union continued to appeal the issuance of injunction and sought a declaration that the Missouri statute was unconstitutional, because it interfered with the National Labor Relations Act, and violated the Supremacy Clause of the Constitution. The Supreme Court held that the case was rendered moot by the expiration of the injunction and the settlement of the labor dispute.

In *Bus Employees*, the same Missouri statute was challenged, and the underlying labor dispute remained unsettled through the appeal to the Supreme Court. The Court held the case not moot. The Court distinguished

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9/ *Division 1287, Bus Employees v. Missouri*, will hereinafter be referred to as "Bus Employees".

10/ Chapter 295, Revised Statutes of Missouri, 1949, referred to as the "King-Thompson Act".

Oil Workers and *Harris v. Battle*, 348 U. S. 803 (1954), (a case challenging the constitutionality of a Virginia statute similar to the King-Thompson Act, relied upon by the plaintiff union), stating that "[i]n both of those cases, however, the underlying labor dispute had been settled and new collective bargaining agreements concluded by the time the litigation reached this Court. Here, by contrast, the labor dispute remains unresolved." 374 U. S. at 77-8.

In the instant case, the underlying labor dispute ended prior to the trial court's hearing of the complaint. Thus, under *Oil Workers*, and *Bus Employees*, this case was moot before the district court dismissed the complaint.

Super Tire's effort to distinguish *Oil Workers* on the basis that the complaint there did not ask for declaratory relief, while Super Tire's complaint does ask for a declaratory judgment, collapses in the face the facts of *Oil Workers* as stated by the Supreme Court. While we do not know the exact terms of the Governor's complaint in *Oil Workers* the issue of the constitutionality of the King-Thompson Act was clearly presented to the Missouri trial court in the union's answer, and the trial court declared the entire King-Thompson Act constitutional and valid in an amendment to the injunction decree. See 361 U. S. at 366. In the union's subsequent appeals to higher Missouri state courts, and finally to the United States Supreme Court, a declaration was sought holding the King-Thompson Act unconstitutional. Obviously, the original complaint in *Oil Workers*, did not seek declaratory relief for the simple reason that the Governor could hardly be expected to challenge the constitutionality of the King-Thompson Act, upon which he relied. The distinction that Super Tire pointed out is simply that in *Oil Workers* the issue of the constitutionality of the Missouri statute was raised by the party who was subsequently enjoined, while in the instant case, the issue of the constitutionality of the New Jersey statute was raised

by the party *seeking* the injunction. This distinction hardly renders *Oil Workers* "inapposite". *Oil Workers* is clearly dispositive of the instant case.

B. The requisite probability that the underlying labor dispute, and the alleged concomitant payment of welfare benefits, will recur is not present in this case.

Super Tire attempts to preserve the instant case from a dismissal for mootness with the contention that the factual setting before the Court fulfills the first probability of the two-prong standard used in *Gray v. Sanders*, *supra*; i.e. the probability that the challenged conduct will occur again. Super Tire argues that New Jersey has given no indication that it will change its policy of ". . . subsidiz [ing] striking employees thereby upsetting the federal labor scheme of free collective bargaining." (Petitioner's Brief, p. 11). Super Tire suggests that ". . . since strikes, like pregnancy, 'often comes [sic] more than once'" Petitioner's Brief, p. 13), another strike by its employees is a "substantial" probability, and that New Jersey will amost certainly take the occasion to pay welfare payments to the striking employees. Thus, the end of the 1971 strike by the Super Tire employees does not moot the complaint.

This argument is sheer speculation. While strikes have occurred in the past at the Super Tire plant, they are, like pregnancy, hardly inevitable. Indeed, the federal policy favoring free collective bargaining, which Super Tire so zealously seeks to protect from state erosion, aims at producing labor agreements and preventing strikes. Super Tire urges the Court to ignore the *fact* of collective bargaining between itself and its employees, the good faith efforts of Super Tire and its employees to co-operate in order to settle disputes short of a strike and the administrative machinery of the National Labor

Relations Act, designed to regulate labor relations fairly for both management and labor, and to accept instead a pessimistic prediction that another strike is a "substantial probability". It is simply not possible to predict with any certainty what the labor climate at Super Tire is likely to be in the future. The past occurrence of a strike at Super Tire need not dictate another strike. Super Tire throws up the merest of "possibilities" in its warnings of a future strike, and Local 676 feels that the probability of another strike is "substantial" at this time only if Super Tire is prepared to state that it does not intend to bargain in good faith when the current contract expires. Since Local 676 does not doubt the good faith of Super Tire, it is submitted that Super Tire's rather apocolyptic fears that another strike is a "substantial probability" have no basis in the facts of this case.

Assuming, *arguendo*, that the "mere possibility" of a strike becomes a reality at some future time, it is by no means a foregone conclusion that New Jersey will find the strikers eligible for welfare benefits at that time. The directive under attack by Super Tire is an "interpretive regulation" of the Respondent, State welfare officials (See App., p. 130), and it does not automatically make all strikers eligible for welfare benefits. Rather, the regulation states only that employees on strike may be included among those "persons [who] are willing to work, but are unable to secure employment . . ." (App., p. 15, §10 of Complaint). In other words, the fact that striking employees may not be disqualified because they are on strike does not guarantee that they will meet all *other* eligibility requirements imposed by the State. Thus, it is anything *but* probable that the State will consider Super Tire's employees eligible for welfare benefits, should they go on strike sometime in the future. 11/

11/ Indeed, there is no evidence on the record to show that Super Tire employees actually received benefits during the 1971 strike.

Super Tire has provided no evidence that either another strike will probably occur, or assuming that such a strike does occur, that the striking employees would qualify for benefits.

C. The mere availability of welfare benefits does not establish either continuing present effect, or probability of future effect upon the interests of Super Tire.

Super Tire claims that the instant factual setting also meets the second probability required by the *Gray* standard - the probability that the recurrence of the challenged conduct will adversely affect the complaining litigant. Indeed, Super Tire argues that the "probability" that welfare payments will be made to Super Tire employees when they again decide to strike has a continuing *present* adverse effect upon its interests. Super Tire claims that the mere *availability* of the benefits alters the "continuing" collective bargaining relationship between Super Tire and its employees, and will hamper future contract negotiations with the employees when the current contract, or any future contract expires. Super Tire suggests that the availability of the benefits encourages the employees to adopt inflexible negotiating tactics, both during the negotiation of grievance disputes, and during actual contract negotiations, secure in the knowledge that if they strike, they will receive State welfare benefits. In addition, Super Tire argues that the availability of the benefits will encourage the employees to strike more readily in the future, causing adverse effects upon its interests. Thus, it is the *availability* of the benefits, and not the actual payment of the benefits, from which Super Tire derives the probability of future adverse effect.

As shown previously, it is not at all "probable" that Super Tire's employees will strike their employer again,

or that the welfare benefits will be available to the Super Tire employees, should they again go out on strike. The facts before the Court do not support the contention that the welfare benefits actually continue to be "available" to the Super Tire employees.

In addition, Super Tire's claim that the case is not moot because this alleged availability has a pervasive and continuing effect upon the "on-going" bargaining relationship, falls before the applicable precedent cited by the Court of Appeals: *Oil Workers, supra.* As Judge Adams noted in the opinion below,

> [i]n *Oil Workers* just as in the present case, the threat to strike, labor's principal economic weapon, was affected by a state program. The employees in *Oil Workers*, could have contended that their collective bargaining ability had been hindered by the employer's knowledge that a strike could provoke an injunction terminating the work stoppage, without resolving the dispute. The present case would appear to be the obverse of this. Here, the employers can arguably claim that their collective bargaining ability is hindered by the employees' knowledge that a strike might be made more endurable through receipt of welfare benefits. (App., pp. 62-3).

The Supreme Court rejected the claim that the continuing threat of State seizure in future labor disputes preserved *Oil Workers* from mootness, citing *Harris v. Battle, supra.*

Super Tire's claim that the mere availability of welfare benefits to potential Super Tire strikers is too speculative to adequately fulfill the requirement that the challenged conduct, if repeated, will affect the complaining litigant. This type of assertion was firmly and totally rejected by the Court in *Oil Workers*, and likewise, it should be rejected here.

D. The instant case does not fall within any rationale of the case of Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498 (1911).

Petitioner places particular emphasis upon the so-called "doctrine" articulated in *Southern Pacific Terminal Co. v. I. C. C.*, 219 U. S. 498 (1911). That case concerned a short-term I.C.C. cease and desist order directed against the Appellant. The Court in reviewing the matter placed stress upon the particular direct harm inflicted by the government agency and the very real possibility of further I. C. C. orders against the Appellant. In reviewing the case, the Court noted that such direct I. C. C. orders, although they could be very short, should not be "capable of repetition yet evading review." 219 U. S. at 515. These words, however, were reflective of the particular unique factual situation of the I. C. C. cease and desist orders directed at the Appellant because of its actions. They should not be raised to the level of a litmus paper like test to determine whether, in fact, mootness has occurred. A careful reading of *Southern Pacific, supra.* reveals that Court's affirmation of and emphasis upon traditional mootness concepts. The Court stressed that "[p]rivate parties may settle their controversies at any time and rights which a plaintiff may have had at the time of the commencement of the action may terminate before the judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action." 219 U. S. at 515, 516. The Court goes on to stress that mootness does in fact occur when "the acts sought to be enjoined had been completely executed, and there was nothing that the judgment of the court, if the suits had been entertained, could have affected." 219 U. S. at 515. In the instant matter before the Court, there is also the same nullity of effect if a Court was to grant the requested relief. If a Court

was to act, it would be acting to enjoin and restrain the public welfare officials when, in fact, they were not and could not grant Super Tire employees any welfare benefit eligibility. This clearly would be the type of "wholly ineffectual" judgment of such "late date" which the Court refused to grant in *Oil Workers*, and which would be wholly inappropriate here.

The "capable of repetition, yet evading review" language was used in *I. T. T. v. Minter*, 435 F. 2d 989 (1st Cir., 1970) yet such language was not used to assert Article III jurisdiction, since a companion case was consolidated with *Minter* wherein the strike was continuing. *Maurice Concrete Products, Inc. v. Minter*, 435 F. 2d 989 (1st Cir., 1970)).

Liner v. Jafco, 375 U. S. 301 (1964) is also cited by Super Tire as supportive of non-mootness. That case, however, is an excellent example of one of the few instances wherein a matter does not become moot because of a strike settlement. That case remained viable because of the determination which had to be made as to whether a bond should have been forfeited because of the wrongful issuance of an injunction restraining picketing. That bond put up by the employer in favor of the striking union remained a very real basis for continuing contention between the parties. No such basis remained in the instant matter when employees stopped the strike and ratified a new collective bargaining agreement. To argue that the dispute continues even after employees are back at work and no longer eligible for any type of benefit ignores the salutary purpose of the National Labor Relations Act which is to promote industrial peace by entrance into collective bargaining agreements.

The decisions of this Court involving mootness insofar as election laws are concerned are particularly supportive of the union's position that because the strike and labor dispute have ended this matter is moot. *Brockington v.*

Rhoades, 396 U. S. 41 (1969), *Hall v. Beals* 396 U. S. (1969). In *Hall* the petitioners were residents of Colorado for only 4-5 months. They attacked a 6-month residency requirement necessary to vote. While in litigation the residency requirement was reduced to 2 months. The case was dismissed by this Court as moot. The Court noted:

> Appellants object now to the 2 months residency requirement as vigorously as they did to the 6-month rule...
>
> But the appellants' opposition to residency requirements in general cannot alter the fact that nothing in the Colorado legislation scheme as now written adversely affects their present interests, or their interest at the time this litigation was commenced. 396 U. S. at 48.

Here, too, in the instant matter, nothing being done now by the State of New Jersey or nothing being done on June 24, 1971 by the State of New Jersey affected Super Tire's interests since the employees are and were no longer eligible for welfare assistance. Indeed the opposition of the petitioner employer has become opposition broadened to welfare eligibility of strikers in general. Just as opposition to residency requirements "in general" was insufficient to stave off mootness in *Hall, supra*, since in fact petitioners were eligible to vote, here too opposition to welfare eligibility for strikers "in general; should be declared by the Court to be insufficient to keep the cause viable under Article III.

In effect, this Court is being asked to apply a rather catchy phaseology lifted from *Southern Pacific, supra*, in substitution for a careful analysis of whether Article III permits it to act. The words of the Court below are particularly apt here. "Because we act only when required can we legitimately act at all." Since the issue presented has become moot, this Court, too, should stay its hand.

CONCLUSION

For all the foregoing reasons, Respondent Local 676 respectfully requests that this Court affirm the Order of the Court of Appeals remanding the case with instructions for the District Court to enter a dismissal for mootness.

Respectfully submitted,

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